The Future of Japanese Legal Studies in the United Kingdom

Part One : Development of Comparative Legal Studies between Japan and the U.K.

In conformity with the view that, "To be sapiens is to be a comparatist,"[1] the study of variances amongst laws of related social role has been a fundamental element of the juridical discipline since earliest times. As early as the Roman republic, Gaius and the Praetor Peregrinus[2] had resort to foreign legal materials in the development of the "jus civile' and "jus gentium', whilst the re-emergence of classical learning, after a millenium of its abeyance, gave us Leibnitz, Vico, Amari, Montesquieu and Fortesque, St. Germain and Fulbecke as early exponents of an approach frequently to be identified with the greatest names in the study of contemporary Western theoretical or practical legal issues. Meanwhile, the school of Chinese Confucian jurisprudence supposedly founded in Japan by Shotoku Taishi had been taken up successively by Nakatomi or Fujiwara no Kamatari, Kiyowara no Natsuno[3] and Koremune no Naomoto[4].

Nearer our own time, the incidence of international involvement, twice collapsing in disaster of global dimentions, has led to wider recognition of the need for a growth in international cultural understanding and institutional harmonisation, following the emergence of an entirely new order of former colonial societies into independent nationhood. This, in turn has given rise to a corresponding interest in comparative legal research, as the former imperial powers sought to equip emergent nation states with systems of law not wholly inappropriate to both their former traditions and their incumbent responsibilities. Unfortunately, in the United Kingdom, such initiative has tended to be confined to the laws of Commonwealth or more latterly European Communities nations, to the

relative exclusion of the United States, the U.S.S.R., China and especially Japan, all, to a greater or lesser extent, recipients of originally European legal principle. Of the greatest names in Japanese comparative legal study, during the same period, none is of greater significance than that of Hozumi Nobushige. In the words of Professor Ito Masami of Tokyo University;

> "Both the historical jurisprudence and the analytical jurisprudence presented the basis of the legal thought of the leading jurists (of the Meiji era) and such thought found its exponent in Dr. Nobushige Hozumi, who played the most important role in the formative era of modern Japanese law."[5]

Later, the work of Suehiro Izutaro, sometimes insufficiently appreciated, showed a sociological approach in keeping with the more independent maturity of a second generation. Post war comparative legal studies have been summarised by Professor Igarashi Kiyoshi of Hokkaido University;

> "One of the characteristics of the study of comparative law in Japan is that the object of study has been limited to the law of four advanced countries, England, France, Germany and the United States. The study on Soviet law started at the same time, but it may safely be said that it has exerted no influence at all upon Japanese laws and legal studies. The law of Asian countries has recently begun to be studied little by little under practical necessities."[6]

One should not pass, finally, without mention of the two excellent articles on the entire course of comparative legal study in Japan, recently published in English by Professor Noda Yoshisuki. After a period of recession hinted at by Professor Igarashi, the stage is now set for a new upsurge of interest in the comparative type of approach. Whatever the vicissitudes of study within Japan, however, a glance at the stock of any legal bookshop furnished ample evidence of a theoretical and practical interest in the comparative approach far in excess of that to be found amongst the essentially more insular English legal scholars.

With the exception of Baron de Montesquieu's gloomy analogies during the period of Tokugawa seclusion, the study of Japanese legal institutions by Western countries has consistently taken place in the context of, first, diplomatic and, later, military pressure to alter the existing Japanese system in accordance with Western societal values.

The first period, taking place between the end of seclusion and the outbreak of the Pacific War, involved several outstanding figures. A narrow stream of information flowed from Japan to the West, almost entirely as a result of efforts by a very few dedicated individuals. The period might be considered as represented by the great American Common Lawyer, John Henry Wigmore and the Anglo-Dutch solicitor, J.E. de Becker, although a number of other figures also made worthwile contributions. Wigmore's signal achievement lay in preserving records of Tokugawa Confucian law from oblivion, whereas, de Becker, by contrast, was more concerned with the availability of the contemporary Japanese private law as a functional system. On the Japanese side, a scholar of Berlin University and a barrister of the Middle Temple in London, Hozumi Nobushige contributed works in the school of Sir Henry Maine of the utmost importance as engendering that spirit of dispassionate enquiry which characterised the best in late nineteenth century European legal scholarship.[7]

The main current of interest, nevertheless, flowed strongly towards Japan from the countries of the Civil and, to a lesser extent, the Common Law, under the influence of statesmen as well as scholars like Hozumi and Suehiro.

The second period, taking place between the beginning of the Allied Occupation and the so-called Nixon "Measures", involved relatively greater numbers but fewer outstanding figures compared with the earlier

period. Amongst Western lawyers, the American, Dan Fenno Henderson might justifiably be considered pre-eminent. Moreover, the Japanese contribution has increased in accordance with the influence of Jeffersonian capitalist democracy, through the work of such as Takayanagi Kenzo, Wagatsuma Sakae and many contemporary scholars. Western interest in the Japanese system has tended to concentrate on patriarchal and relativist elements, especially as apparent in the Constitution, Civil Code and Commercial Code, together with their supplementary special legislation.

Moreover, a continuing flow of information in Japan's favour is the more impressive as having been achieved despite a high number of American lawyers practicing in Japan shortly after the War. Large numbers of Japanese legal scholars have undertaken study in the West, mainly in the United States, Germany, or France, but with a few enterprising souls challenging the mysteries of London or Cambridge. The period might be said to have ended symbolically with the call to the English Bar of Naritomi Nobukata, the only Japanese ever to have been so called on examined merit.

Thus, the two main trends have been;

1. a flow of information away from the West as a consequence of the patronage implied by Japan's "Westernisation" and "democratisation" during the late nineteenth and mid twentieth centuries,[8]

2. the location of Western interest in Japanese law tending to move away from England towards Europe and the United States.

The overall published result of this saga is insufficient to fill more than a good sized bookshelf, hardly enough to support the four or so American universities now teaching Japanese law. Europe as a whole has signally failed to profit from the tremendous capital of her legal investment in Japan. As far as the United Kingdom is concerned, up to 1974

the appalling record stood at Butterworths' publication of De Becker's and Hozumi's work, together with a number of articles published in the Transactions of the Asiatic Society of Japan at the end of the last century. A single article published in the International and Comparative Law Quarterly since the War dealt with the Anglo-Japanese commercial treaty.[9]

Part Two: Japanese Legal Study as Comparative Law

Whilst the study of foreign laws in any guise remains the ornament of a relatively few notable scholars in each generation, the lack of any consensus of opinion on the essential nature and limitations of comparative legal study can scarcely be surprising. In the West, the debate has largely remained on a semantic level. In 1939, Professor Clive M. Schmitthoff pointed out[10] the essential distinction between those Common Lawyers, such as Holland[11], Bryce[12], Jenks[12a] and Gutteridge[13] who, together with Professor Kaden, considered comparative law primarily as a method and Civilians like Saleilles, Lambert[14] and Rabel, who regarded it rather as a specific branch of legal science[15]. As the learned author suggested, the distinction here is largely one of philology. Indeed, all the views admit comparative law to be a process of more or less scientific nature, applied either to law generally or, as Gutteridge puts it to "any branch of legal learning". In practice, then, the distinction must find its basis in the different conceptions of "jurisprudence" current in the countries of Common Law and those of Civil Law background, with a relative emphasis corresponding roughly to a division between the general and the specific theoretical development of law.[16] In the former case, "comparative" is used to denote an approach to the underlying rationale of law, in the latter, an element of the discipline imposed by it. More recently, Mr. Kanba has suggested;

> "It should be emphasised that comparative law is the systematic application of comparison to law. Casual reference ... is not comparative law."[17]

Professor Watson, attempting to take a fresh look at the problem, has restricted his definition to;

> "... a study of the relationship, above all the historical relationship, between legal systems or between the rules of more than one system."[18]

Moreover his recent controversy with Sir Otto Kahn Freund serves to illustrate the continued significance of these uncertainties.[19] [20]

In relation to Japanese law, however, the views of the late J.H. Wigmore must carry particular significance.

Despite the continuing divergence of emphasis, certain factors, nevertheless, emerge from the debate as common to the weight of opinion. These relate, first, to the purpose, second, to the substance and, third, to the method of comparative legal study.

I. Purpose

The observable purposes of comparison are so universally flexible as to be either totally separate from the basic concept, or capable of definition only in the most comprehensive terms of legal scholarship. Professor Kaden has maintained that comparative law is merely a method, devoid of intrinsic purpose. This has been denied, on the other hand, by Holland[21], Bryce[22], Jenks[23], Allen[24], Schmitthoff[25] and, more latterly, by Kamba[26], Watson[27] and Kahn Freund[28], who maintain, rather, that purpose forms an intrinsic element of comparative legal study. Whilst a number of ostensibly comparative legal works, mainly compilations of "foreign" legal materials for use in American law schools omit to indicate any specific conclusion, the weight of opinion would seem to have accepted the view that the comparative approach to law is essentially purposive. Thus, in the words of one authority;

> "Comparison as a popular pastime may be content with merely identifying differences or similarities between the things compared, but comparative law, being systematic, goes further and seeks to explain the differences and similarities." [29]

Accurate classification of the purposes of comparative law, moreover, is a pre-requisite for any appreciation of its potential significance.[30] Unfortunately, it is in relation to the identification of precise purposes that the widest range of views is to be found, due, no doubt, in large measure, to the utilisation of comparative techniques in support of a variety of often conflicting juristic arguments. Thus, Holland speaks of;

> "... separating the essential elements of the science from its historical accidents."[31]

and Bryce;

> "... helping us to disengage what is local or accidental or transient in legal doctrine from what is general, essential, or permanent."[32]

Yet such definitions identify the very purpose of jurisprudence itself.[33] The point is given further emphasis by Professor Watson;

> "Likewise, it should be conceded that certain legal concepts -causation is a good example - and their actual delineation in various systems can be the object of an inquiry on the highest intellectual and systematic plane. But the point of these inquiries is to explicate a concept of great importance in law by a careful examination of the way in which it operates in the detailed context of different legal systems, (as well as the way in which it is discussed by legal theorists). Then, I venture to suggest, the study is primarily jurisprudential and is support for the widely held view that much of jurisprudence is unthinkable without comparison from various systems."[34]

Moreover, many authorities have recognised an innate polarity, corresponding to the distinction between abstract applied matters, by which such purposes may be classified. Bryce's views are fairly representative;

> "The comparative... jurisprudence appears, however, in two forms. One of these must, like the science of comparative grammar, crave the aid of history, for the study of the differences between two systems becomes much more profitable when it is seen how the differences arose, and this can be explained only by social and political history.

> ... What the comparative method does for legal training and legal theory it does in its first mention and historical form ... The other form, though it cannot dispense with the aid of history ... has a narrower range in time, being directed to contemporary phenomena. It has, however, a palpably practical aim. It sets out, by ascertaining and examining the rules actually in force in modern civilised countries, and proceeds to show by what means these rules deal with problems substantially the same in these countries. It is when we leave the field of legal philosophy ... for the field of particulars and details that the practical value of the comparative method begings."[35]

The "Nomogenetics" and "Nomothetics" of J.H. Wigmore are based on a similar distinction. By means of the former;

> "We may seek to trace the evolution of the various systems in relation one to another in chronology and courses..."

and by the latter;

> "... we may seek to analyse the politics and relative merits of different legal institutions with a view to moulding legislation."[36]

Thus, the "whole field" of comparative jurisprudence indicated by Professor Gutteridge has consistently been used to provide material for either the derivation of universal theoretical principle, or the determination of particular practical rules, suggesting the parallel distinction between comparative legal philosophy and comparative legal science. These two extremes may conveniently be labelled Pattern A and Pattern Z purposes, respectively, indicating and unspecific degree of interaction.

Pattern A was only reluctantly recognised by Sir Henry Maine, whose "Lectures on Village Communities in the East and West" could be admitted within the scope of comparative jurisprudence only where "comparative" was employed in the same sense as in "comparative" philology or "comparative" mythology.[37] Lambert, however, was more enthusiastic;

> "The discovery of... the causes which underlie the origin, development and extinction of legal institutions, or, in other words, legal history... is closely allied to ethnological jurisprudence, folklore, legal sociology, and philosophy of law. It endeavours to bring out, through the

> establishment of a universal history of law, the rythms or natural laws of the succession of social phenomena, which direct the evolution of legal institutions." [38]

Accordingly, we are here concerned with the philosophy of law as an attempt to chart and evaluate the "flux and reflux" of legal institutions on a universal basis. This is not without its attendant dangers, however. The "most learned, full and modern version" of this approach has recently come under criticism as succumbing to the temptations of doctrine to the exclusion of fact. As Professor Watson points out;

> "What is here denied is that one can set up a theory of general legal development applicable to all or many unrelated societies." [39]

The understanding of law as a universal or diverse phenomenan, then, is a fundamental controversy which has inspired the development of competing schools of legal philosophy since Montesquieu's use of comparative illustration to question the established order of the natural law school. The basis of this approach is what J.H.Wigmore referred to as the Recurrence of Legal Cycles;

> "Similar problems, methods, abuses and remedies seem to recurr amidst diverse surroundings. The thoughtfull lawyer begins to discover (without waiting for the authoritative interpretation of some profound seer) that the legal life of mankind, variant as it is, deals with materials so simple and limited in type that the same situations, "mutatis mutandis" keep recurring with startling persistance."[40]

Consequently;

> "Comparative law is indispensable to the legal theorist or legal philosopher" (for the formulation and testing of general theories of law)" for instance, how universal is the Western idea of law with its close associations with specialised agencies for its making, interpretation, application and enforcement; How far do the traits of Western legal systems represent the characteristics of legal orders in all societies?" [41]

Pattern Z, by contrast, was readily admitted by Maine;

> "...if not the only function, the chief function of comparative jurisprudence is to facilitate legislation and the practical improvement of law."[42]

Similarly, Lambert's "comparative legislation";

> "... represents the effort to define the common trunk on which present national doctrines of law are destined to grant themselves, as a result of both the development of the study of law as a social science and of the awakening of an international legal consciousness."[43]

Comparative law as legal science, therefore, is concerned essentially with the appreciation of archetypal legal principle in the legislative and executive practices of law.[44] Examples abound at domestic, federal and, increasingly, at the international level. As early as 1918, J.H. Wigmore wrote of the unification of international private law;

> "Looking back at the story from today's achievements, it partakes of that romance which success gives to the beginning of all great enterprises, and like the antislavery movement and others that have changed the world's history, it seems to take origin in fruitless but necessary idealism and then to pass into effective realism. ...The annuals of the last half-century record the vigorous growth of this tremendous achievement."[45]

Maine's influence on the views of his disciple Hozumi Nobushige has been reflected in the later development of comparative legal study in Japan.[46] Thus, as Professor Igarashi explained in the late 1960's;

> "As to the position of Japanese law in the world legal systems, from the point of view of comparative law, opinion is divided amongst European scholars. This is an important problem for us to study in the future ..."
> "Another characteristic is that our study has chiefly been done with the purpose of acquiring information helpful to our own legislation or interpretation of laws. Other purposes, such as to establish a general theory of law, to resolve practical question and to make a uniform (international) law have not been laid much stress upon, although recently they are coming to be thought important subjects."[47]

II. Substance

All authorities appear to accept that, whilst of potentially great academic or practical value in itself, the study of a single system, concept, principle or problem in isolation can, in no sense, come within any reasonable definition of comparative law.[48] There must always be at least two separate elements, forming distinctive if not isolated units within a

common conceptual relationship.

The determination and selection of societal elements for comparative treatment is of fundamental importance. Even without any allowance for the bias of individual views or prejudices, such matters may be subject to interpretation from a bewidering variety of philosophical, anthoropological, sociological, economic, political and, of course, legal standpoints. Thus, what, even in the light of a single cultural perspective, may appear initially as a patchwork of environmental or aspirational elements when viewed according to any particular, say for example, sociological, discipline, may be revealed subsequently as a single cohesive principle when viewed according to the precepts of the distinctive legal approach; or, of course, vice versa. Once a further dimention, namely that of cultural perspective, is brought into play, however, the potential difficulties reach a degree of complexity of almost absurd proportions. It is, therefore, apparent that, in a last analysis, the resulting choice can hardly be expected to display more than a fairly arbitrary basis. It is, on the other hand, not unreasonable to expect a degree of identifiability and consistancy in the use of legally significant terms. Fortunately, the usual formality of the legal process is a considerable help in alleviating such potential pitfalls.

It is, moreover, a common characteristic of comparative law that, whereas a common context linking the legal elements chosen for comparison may be drawn from the "whole field" of legal experience, its selection is a common denominator linking the purpose to be achieved by with the method to be employed in its analysis. Thus, contrary to the narrow constraints sought to be imposed by Professor Watson, the substantive basis of comparability may embrace historical, geographical, social, cultural, technical, indeed all rational relationships. In particular,

comparison of the same system at different stages in its development is a long familiar technique, although one not always recognised as falling within the comparative field. Accordingly, it is far from true to suggest that comparisons must be confined to the laws of different states.[49] Consequently, intertemporal as well as international bases of comparison must be regarded as legitimate. Moreover, provided that some meaningful relationship can be perceived, comparisons may legitimately be drawn at different or the same periods of time, within different or the same systems of law and even between contemporaneous laws derived from ultimately the same authority at different technical levels. Thus, not only may Roman Civil Law and local Common Law be compared, or German and English law, for example, but also the "jus gentium" and "jus civile", international and domestic, academic and customary law, or equity and common law. Expediency, in fact, however, dictates a number of practical considerations. A common context which is too narrowly drawn will hamper the scope for comparison or contrast and so render the exercise impractical, and, conversely, one which is too widely drawn is liable to make such comparisons or contrasts difficult to highlight and so lose the point of the exercise.

> "It is quite feasible, for instance, to compare the laws of the ancient races of the East with modern European law, but, as Pollock observes, such comparison can lead to nothing but ludicrous if not dangerous misunderstanding."[50]

On the other hand, the common assertion that the substantive context falls within a relationship of approximate equality in development begs the question. What might perhaps be argued, though, is that the relationship involves the contribution of principle by one element to the other, or that both elements share an operative relationship in international private law. It might perhaps be postulated, then, as a general rule that the potential

value and significance of any comparative study is likely to be determined by the depth to which substantive elements relate at levels beyond the law.

As a result, many authors have expressed a sense of caution in the selection of comparative substance. In the words of one authority;

> "Varieties in the political, moral, social and economic values which exist between any two societies make it hard to believe that many legal problems are the same for both except on a technical level."[51]

Again;

> "There is always a danger that foreign legal institutions and ideas may be adopted without sufficient adjustment to local circumstances. Where this has happened it has often been with disastrous results."[52]

Accordingly;

> "It cannot be doubted that a rule transplanted from one country to another, from Germany to Japan, may equally operate to different effect in the two countries, even though it is expressed in apparently similar terms in the two countries."[53]

Substantive elements selected for "Pattern A" purposes can normally be expected to have an essentially conceptual orientation. This, however, may be either explicit or implicit in the subject matter. An obvious and very significant explicit concept in the field or commercial law would be that of "good faith". It is worthy of comparative treatment essentially because, although its realisation is likely to differ widely between social cultures, its formulation is almost uniformly constant in all of them. Concepts may be implicit in the discussion of a particular type of social movement, such as the mercantile or industrial revolutions, or of a particular person's work, like that of Grotius or Bentham.

These are likely to be examined on the basis of what might be called an "outer relationship" as described by Watson[54], in which the development of existing institutions has been influenced by a series of contri-

butary legal elements. The normal relationship within which such elements are determined, in this case, is likely to be a historical one, involving societal reception and assimilation of foreign laws. The difficulty, however, is to determine what is indigenous. Clearly, although "no man may be an island",[55] yet each is an individual. Consequently, if what is true of men severally is also true of mankind collectively, the determination of cultural boundaries can be no simple matter. In practical terms, however, it should be possible to say that, although no societal culture is wholly free from outside influence at all times and in any aspect of its life, the particular nature and combination of successive influences endows it with its own distinctive peculiarities of character. To the extent that it may be determinable, this is the only perceptible indigenous element in society. Herein, however, lies the fundamental conflict between countervailing pressures for convergence and divergence, between an increasing perception of common environmental resources and remontant aspirations towards their several institutional exploitation. Again, Professor Watson's comment is instructive;

> "... if a 'natural relationship' did exist between all legal systems at some stage in their development, then a proper part of comparative law in its own right would be the study of that relationship. That a historical relationship exists between some early systems is undeniable and a proper study for the comparatist. And one should admit that often early systems which have no historical relationship display similarities in some of their aspects - it would be astonishing if at times different peoples did not have the same basic response to a situation."[56]

Substantive elements designed to achieve purposes within a "Pattern Z" configuration can normally be expected to have a "problem" orientation. This might be either a legislative problem of law reform or an executive problem of its implementation. Obvious examples of the former would be the need for formulation of international uniform laws, such as those regulating the international sale of goods, whereas an illustration of the

latter would be the determination of "renvoi" in an international sales contract not subject to such uniform law.

Such elements are operative within Pringsheim's "inner relationship" whereby the values of one society carry particular significance to those of another. This may be promoted by the success of one society's material and cultural products in relation to another. The impact of such closely related end products is largely a question of technological range,[57] especially in terms of variety, as interacting with social advancement, especially in terms of participation, ultimately becoming a question of customary and ethical values. A truly sophisticated society, therefore, might be broadly described as one able to produce a varied range of materials as at the same time both the expression and ornament of an advancement in its level of participation.

The course of Japan's social development in relation to other societies makes it especially material to questions involving the incidence of universality and diversity in legal evolution. Although perhaps ironic, it is by no means coincidental that, at the time of the Tokugawa bakufu, Montesquieu should have chosen to cite examples of the Japanese system in a work which came to mark an end to the established order of the Natural Law School. In general, then, it is both the relative variety and clarity of Japan's societal development which is of value. Moreover, two particular factors, Japan's cycle of emergence and seclusion in relation to other societies and the time scales between such cycles, are especially germane to this type of problem. Examples of this approach are not difficult to find, but Professor Kitagawa Zentaro's well known work on theory reception is perhaps most clearly in point.

Japan's successive acceptance of foreign institutions has left her currently sensitive to Western societal values originating in Germany,

France and Britain, but especially as developed in the United States. The legal systems of these countries are widely studied and many practicioners' commentaries cite examples of such foreign law to illustrate practical points of interpretation. Nor is it too difficult to find examples of its operation in practice. In Vacuum Oil Co. v. Dampfsschiffsreiderei Union A.G.,[58] the respondants were being sued for loss occasioned through the leakage of oil during carriage by sea. On appeal from the judgement of Tokyo High Court to the effect that damage caused by bad weather and high waves had been impossible to prevent, appellant's counsel unsuccessfully attempted to persuade the Tokyo Court of Appeal that the Civilian doctrine of "force majeure" was equivalent to the Common Law principle of "Act of God" for the purpose of excluding thunder, earthquake, and extraordinary tempest from the available defences. Understandably, the Court declined to comment on this somewhat ingenious idea!

III. Method

Even the study of different foreign elements cannot come within the rubric of "comparative law" unless it employs a method of analysis based on a systematic cross reference between juxtaposed material elements.[59] The precise methods employed, however, vary widely in technique. In particular, cross reference may operate in a broad or detailed manner and in units of whole chapters or by mere footnotes. It is probably true to say, however, that the general trend is tending towards analysis in a rather detailed manner, employing large material units. Moreover, it would be a mistake to assume that such analysis need necessarily be simple. Compound analysis of the same subject matter from different hypothetical bases may have much to recommend it as a technique intended to produce specific results. Thus, the use of comparative methods falls into two general groups.[60]

Analysis of substantive elements intended for "Pattern A" purposes may conveniently be labelled the "kinematic" technique. In its most obvious form, this is a simple method of cross reference, suitable for analysis of organic development amongst laws by means of a series of pictorial descriptions of one legal element in relation to another at significant points of interaction, normally comprising periods of intense foreign reception. Its most effective form, however, employs a compound analysis in which such pictorial descriptions of reception and assimilation are compared one with another in order to obtain a clear view of the incidence of development. Perhaps the most famous, if not these days the most uncriticised of works using this type of method, despite his own misgivings, are those of Sir Henry Maine. It is, of course, generally accepted that Maine's pioneering work was the product of a brilliant intuitive rather than of a disciplined scientific mind.

Analysis of methods designed to achieve purposes under "Pattern Z", by contrast, might, somewhat fancifully perhaps, be conveniently labelled the "kaleidoscopic" technique, in order to distinguish it from the former. This operates as a method of cross reference between separate elements contributing to the solution of a problem by a series of functional analyses of each element likely to be affected by the impact of the others. Normally, it can be expected that this will be followed up by further analysis of the total effect of their interaction. A current illustration of this approach is to be found in the title of Professor Graveson's book "Comparative Conflict of Laws". Moreover, it is a method frequently employed in conjunction with more conventional techniques by the British Law Commission.

These types of approach are quite familiar to Japanese legal study at any rate, as to their content if not in their terminology. The dis-

tinction commonly drawn between "comparative law" strictly so-called and the comparative approach to specific legal subjects must lead inevitably to a corresponding distinction between the methods employed. This is apparent in some degree from a glance at the contents of "The Comparative Law Journal", "Hikakuho Kenkyu", in relation to those of any reputable law magazine in a specific functional field. It is further emphasised by professor Noda's concentration on the former approach to the exclusion of the vast bulk of Japanese comparative work to be found in the standard works of reference.

Thus, comparative law may be defined as legal analysis through the juxtaposition of related societal elements as a means of discerning their mode of variance. Under such a definition, it is almost impossible to dispute that, irrespective of the state of law as jurisprudence in Japan, much of Japanese law is inherently comparative in character. Consequently, its most obvious value to English lawyers must be as a yet entirely untapped source of comparative legal study.[61]

Moreover, although comparative legal philosophy is by no means a new development in English law,[62] the comparative approach to legal science as a practical exercise at a more mundane level has recently received a major stimulous as a result of Britain's accession to the European Communities. The "harmonisation" provisions of the Rome Treaty, especially, are significant. This is a trend likely to increase in strength and it is hoped that its further development will bring about a general broadening of horizons in English legal scholarship.

Further, comparative law has been shown to display two significant extremes within a unified whole, one of which tends to stress a theoretical, the other the practical approach. Japanese law provides an exceptionally comprehensive and clear illustration of legal development in relation to

foreign systems. It is also the regulatory mechanism of an advanced trading nation combining legal elements of potential significance to a wide variety of other mercantile states. Consequently, another value to English lawyers is as a foreign system of law highly significant to our own comparative legal studies.

The major question posed by contemporary Japanese law, then, is essentially one of identity. This may be postualted in terms of systemic or legal family orientation, or ideologically as a question of adherence to the rule of reason rather than a rule of law philosophy.[63] The significance of the legal standard within Japanese society, regarding, for example, the development of a hiatus between conventional Confucian values and received legalist principle, is regarded as especially important where the relationship of the state to the individual is concerned.

The significance of Japanese legal study, however, has entered an entirely new and more practical phase as a result of both the recent enlargement of the European Communities and the "miraculous" transformation of the Japanese economy. This may conceivably take either of two forms. In its first form, then, it may well be that study of the problems faced by Japanese lawyers in interrelating elements from diverse original sources would be of considerable value to the various legislative authorities of the European Communities in the adjustment of Civilian and Common Law elements to the future development of the Communities as a whole.[64] In its second form, the need to understand Japanese law is increasingly making itself felt to legal practicioners in the field of international business, especially in relation to such matters as the conflict of laws affecting sale of goods, shipping, commercial securities and in the public and private regulation of companies.

Accordingly, the significance of the Japanese experience to the

comparative study of law in the United Kingdom can be characterised as resting, first, on its unique amalgam of Confucian, Civilian and Common Law elements and, second, on its varied moment of change.

Part Three : Institutional Provision for Japanese Legal Studies in the United Kingdom

Comparative law is based on a desire to understand and learn from the experience of others. Japan has demonstrated what may be achieved by the often painful acceptance of alien ideas into an established social tradition. English comparative lawyers can now begin to learn from Japan. Here legal tradition has much to contribute towards modern research into the nature of law or the harmonisation of laws at a supranational level.

The person seeking to undertake such a task, however, must be able not only to identify and translate materials, but also to comment on the result with professional insight. This means that he must not only be able to translate Japanese, perhaps in the literary form, but also possess a fund of legal knowledge not easily acquired. The need for a professional qualification in English law is, of course, self evident, but he will need in addition a basic knowledge of the American Common Law variant, the Pandectic Roman based Civilian systems of Germany and France, together, preferrably, with a nodding acquaintance with Confucian Chinese principles. No doubt, a knowledge of Russian law might be an asset as a medium of contrast! Above all, he must have an empathy with Japanese society without the sacrifice of an objective academic standpoint, and be possessed of inexhaustible patience. Perhaps an exponent of Zen with additional training in Socratic philosophy and a lifespan of some two centuries would be the ideal basic requirement![65]

A number of existing academic institutions in the United Kingdom

hold a potential interest in Japanese law. These may be divided roughly into two groups.

The first group comprises the so-called "four centres" of Japanese studies at Oxford, Cambridge, London and Sheffield. In general, the studies undertaken in such universities revolve around a central commitment to the Japanese language, but with supplementary interests in literature, sociology, politics and economics. Almost without exception, however, such supplementary interests are developed from a historical rather than a functional viewpoint. The eventual aim is to develop an all round insight into Japanese culture in the sense of the liberal humanities. Whilst such "Japanologists" are normally highly literate in terms of purely Japanese social arts, they are often lacking in the wider contextual vision and disciplinary insight necessary to an effective professional appraisal of specific Japanese societal mechanisms. Therein lies the weakness of the "centres" as a potential base on which to develop the study of Japanese law. In the first place, the major significance of Japanese law has been shown to lie essentially within the scope of the comparative approach to jurisprudence. The study of Japan's legal institutions in complete isolation would remove much, perhaps most, of its potential value to the English lawyer. In the second place, it is doubtful whether it would be possible to discount essential legal training sufficiently to enable studies in Japanese law to be undertaken in any significant depth. Nevertheless, embryonic interest is being shown within such "centres" in going some way, at least, towards solving the problem by a combination of Japanese language and legal studies. This is a welcome development, although it remains doubtful whether even such a solution would be capable of producing sufficient comparative legal insight to attract and maintain the interest of potential corresponding Japanese colleagues.

In 1974, the British Association of Japanese Studies was founded with a view to promoting the study of Japan throughout the United Kingdom. This is an excellent body which meets annually in April for the study and publication of research papers relating to Japan in a wide variety of disciplines, including that of law. Any Japanese legal scholar seeking to deliver a paper at such a conference can be sure of a hearty welcome from one English lawyer!

The second and most obvious source of potential interest in Japanese law, of course, emanates from the various academic and professional schools of law. Yet here also there are difficulties. In England, unlike Japan, a close relationship, derived from the Common Law doctrine of precedent, is maintained between the scholastic and the practical studies of law. University law staff, for example, are normally required to hold professional as well as academic qualifications. The university law syllabus also is typically structured so as to satisfy the requirements of the professional bodies for maximum exemption from their own training programmes. Less fortunately, as a result, academic law has normally tended to be conceived purely in terms of the English system of law. As one of the world's major originating legal systems, English law is relatively self-contained, thereby lacking any direct motivation for the study of "foreign" elements, at least from outside the Common Law "family", subject to the odd exceptional reference to such classic authors as Pothier, by way of embellishment. Consequently, even though such sentiments are rapidly having to concede ground to those who would prefer to see legal studies taught on a more universal basis, as one of the major ramparts of civilisation hitherto conceived, comparative law can be expected to occupy a subsidiary position in university law teaching up to at least the postgraduate level.[66] Moreover there is rarely any opportunity

for students undertaking degree level courses in law to study a foreign language, even at an elementary level. As a result, it would be self deceptive to expect interest in Japanese law to blossom overnight like the sakura. In point of fact, Japanese law has not been taught at any United Kingdom university until this year. However, the University of Aston in Birmingham is experimenting with a legal stream keyed to the concept of assessed seminar research papers. This work is often undertaken from a comparative viewpoint, where the subject matter is suitable for such treatment. The opportunity to explore Japanese law as a constituent of an overall comparative approach is being implemented, as a result, at a fairly elementary level, in courses dealing with legal method, commercial law and company law. Moreover, encouragement is being given to students wishing to undertake post graduate research into Japanese law. As from January of 1978, moreover, the University is initiating the first of a series of annual short courses in Japanese business law, open to lawyers in private and corporate practice. In addition to the ordinary teaching programmes, it is also hoped to mount a series of special open lectures to be given by a Japanese expert in the field concerned. Finally, it is hoped that circumstances may enable the University to establish visiting staff posts in Japanese law on an ad hoc basis in the near future. In order to cater for the problem of language, elementary written and spoken Japanese has been introduced as a one year complementary study open to all second year students reading any subject. It is hoped that this will enable students to progress to the point where they are able to work slowly with the aid of a dictionary from original sources.

What, then, might the future hold for Japanese legal studies in the United Kingdom?

In the normal course of events the inevitable answer must be, "little

beyond the embryonic matters already alluded to."

What is needed, then, is the establishment of a body, independent of existing institutions, capable of acting as the focal point of Anglo-Japanese legal research in the United Kingdom, by bringing together representatives from the four "centres", the law schools and the practicing professions. Exploratory initiatives have already been taken in this direction, and it is hoped that the nucleus of at least an experimental institute might emerge in the not too distant future. Further disclosure at this stage, however, would be wildly premature. Nevertheless, a few general observations might not be out of place. The underlying rationale would be the dynamism inherent in cooperation between two major originating and synthesising systems, in the pursuit of comparative legal objects. Its basis, therefore, would lie in a joint Anglo-Japanese approach to problems of common as well as merely mutual interest. It should perhaps be emphasised that this would not preclude subjects beyond the bilateral relationship of English and Japanese law.

It is, one must by now hope, clear, what value Japanese law might hold for the English lawyer. But what of the converse, first, let it be said that, as the originator of the Common law systems, English law occupies a position of relative privilege amongst its modern derivatives. Moreover, it is often able to present an alternative legal view to that found amongst the latter. Second, is a fact perhaps insufficiently heeded amongst Japanese legal scholars. The potential importance of the European Communities to Japan is difficult to exaggerate. Yet, although this represents a large and growing body of supranational law, sui generis, it rarely seems to be accorded the attention normally given to events of this dimention. The Civilian systems of the original six members are indeed very widely studied, but, in the cross-fertilisation of ideas at the

supranational level, the relatively little known common law of England and Ireland has already had a significant effect on, for example, draft legislation relating to corporate accounts; a field in which the Japanese legislator is currently showing an active interest.

Given these circumstances, then, what might the future hold? This, of course, is yet in the lap of the gods. Still, at the least we might look forward to the time when it will be possible to establish an independent Japanese Common Law or Japanese European association for legal studies. One word of caution, however. In their several ways, both Japan and Britain have been characterised as pragmatic societies. It now behoves us to invoke this common sense of what is immediately feasible in the interests of what in the long term would be ideal. By all means let us do something soon, but "festina lente", let us make haste slowly.

Footnotes

1. Hall; Comparative Law and Social Theory; Baton Rouge 1963, p.9.
2. Followed in the fifteenth century by the "emendatorii" and "statutarii" of the Italian mercantile city states.
3. Ryo no Gige; working with twelve trained legal assistants.
4. Ryo no Shuge; also assisted.
5. Report of the 1966 Conference of the Japan Society of Comparative Law.
6. Ibid, note 5. above.
7. Hozumi; Lectures on the New Japanese Civil Code; Ancestor Worship and Japanese Law.
8. See Catalogue of Foreign Language Materials; Tokyo University Centre for Foreign Law Materials 1966 as supplemented.
9. In 1933, Professor Jenks noted:

> "... the exchange of law students amongst the Universities and other law schools has sensibly developed since the (first) War. England has probably received in this respect more than she has given, and though this fact may be flattering to her national pride, there are dangers in it for her." The New Jurisprudence; John Murray 1933 ch. 11."

10. Schmitthoff; The Science of Comparative Law; VII Cambridge Law Journal 1939–1941, p.94 ff.

11. Holland; The Elements of Jurisprudence; Oxford 2nd. Edn.1882, pp. 7–8.

12. Bryce; Studies in History and Jurisprudence; Oxford 1901, Vol.II, pp. 186–190

12a. Jenks; note 9 above.

13. Gutteridge; Comparative Law;

14. Lambert; The Value of Comparative Law; Journal of the Society of Public Teachers of Law, 1931, p.28.

Encyclopedia of the Social Sciences; London 4th. edn. 1931 p.126.

15. Hazard; Comparative Law in Legal Education; University of Chicago Law Review 1951.

16. A distinction also noted by Professor Butler in an inaugural lecture entitled "Comparative Jurisprudence and International Law" delivered at University College, London 17 Jan. 1977; now published in the series "Current Legal Problems".

17. Kamba; Comparative Law–A Theoretical Framework; 23 International and Comparative Law Quarterly 1974,p. 485 ff.

18. Watson; Legal Transplants; Scottish Academic Press, 1974, p.9.

19. Kahn Freund; On Uses and Misuses of Comparative Law; The Second Chorley Lecture; 37 Modern Law Review 1974, p.1. Watson; Legal Transplants and Law Reform; 92 Law Quarterly Review 1976,p.79.

20. Additional bibliography:

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Paton; Jurisprudence; Oxford 4th.edn. 1972,pp.3–4.

Pollock; Essays in Jurisprudence and Ethics; p.3–4.

21. Holland; note 11 above.

22. Bryce; note 12 above.

23. Jenks; note 9 above.

24. Allen; Legal Duties and Other Essays in Jurisprudence; Oxford 1931,p.12.

25. Schmitthoff; note 10 above.

26. Kamba; note 17 above.

27. Watson; note 18 above.

28. Kahn Freund; note 19 above.

29. Kamba; note 17 above.

30. Kamba; ibid. note 17 above.

31. Holland; note 11 above.

32. Bryce; note 12 above.

33. Paton; note 20 above.

34. Watson; note 18 above.

35. Bryce; note 12 above. See also Kahn Freund; note 19 above.

36. Wigmore; A new Way of Teaching Comparative Law; Journal of the Society of Public Teachers of Law 1926, p.6.

37. In the footsteps of Emerico Amari.

38. Lambert; note 14 above.

39. Watson; note 18 above, referring to A.S. Diamond; Primitive Law Past and Present.

40. Wigmore; Editorial preface to General Survey of Continental Legal History; Rothman Reprints 1968, XLII.

41. Kamba; note 17 above.

42. Maine; Lectures on Village Communities in the East and West, quoted in Pollock; Essays in the Law; Macmillan 1922, p.3.

43. Lambert; note 14 above.

44. Thus, for example, Amos Sheldon's Draft Contract Code was a product of comparative legal science. See also Art.38 (1)(c) Statute of the International Court of Justice.

45. Wigmore; note 40 above.

46. Thus, hozumi's Hoten Ron of 1891 is a highly comparative work written with the new Civil Code in mind.

47. As note 5 above.

48. Thus, Wigmore's Law and Justice in Tokugawa Japan is not a work of comparative law. The same point is developed by Pollock at pp.3–5 and by Butler. See notes 20 and 16 above.

49. Allen; note 24 above.

50. Wigmore; note 40 above.

51. Schlesinger; Comparative Law: Cases, Texts, Materials; p.35 note 5. Kahn Freund to the same effect, See note 19 above.

52. Kamba; note 17 above.

53. Watson; note 18 above. See also Kahn Freund; note 19 above, Montesquieu; The Spirit of the Laws, p.12 (English Edition).
Stone; The End to be Served by Comparative Law; 25 Tulane Law Review p.326.
Wigmore; More Jottings on Comparative Law, Ideas and Institutions; 1931 Tulane Law Review pp.244–263.

54. Watson; note 18 above, p.6.

55. A paraphrase of the famous line by the early seventeenth century English metaphysical poet, John Donne.

56. Watson; note 18 above, pp.12–13.

57. But see Kahn Freund; note 19 above.

58. At Taishin' in Minji Hanketsuroku 807 (To. Ct. of Appeal) 1910.

59. Pauls, 1926
of the World's Legal Systems published by Washington, St. Pauls. 1926 is not truly comparative.

60. See Butler; note 16 above. A distinction between the Common Law "artistic" and Civilian "quasi scientific" methods is ascribed to a nineteenth century derivation from Darwin and Marx.

61. Thus, a number of "transmitting" systems including those of

France, Germany and the United States have supplied material to certain key "recipient" systems including, for a variety of reasons, those of Japan, Turkey and Abbyssinia.

62. Mizuta; On Comparative Jurisprudence in England; 1 Comparative Law Journal 1950.
Mizuta; Education of Comparative Law, Its Present Conditions in America; 2 Comparative Law Journal 1951.
Igarashi; Three Views on Comparative Law; 7. Comparative Law Journal 1953.
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Mizuta; Life and Works of the Late Professor Gutteridge; 9 & 10 Comparative Law Journal 1955.
Ishizaki; Comparative Law and Institutions for Study of Comparative Law; 13 Comparative Law Journal 1956.
A.T. von Mehren; Some Remarks on the Position of Comparative Law in the American Law School Curriculum; 14 Comparative Law Journal 1957.
Mizuta & Sasaki; International Conferences on the Comparative Law; 18 Comparative Law Journal 1959.
Taniguchi; Attending the Fifth International Congress of Comparative Law; 19 Comparative Law Journal 1959.

63. Rule of reason systems are likely to include both Confucian and Communist laws, which alike look to the "withering" of the law as an ultimate goal, with similar results.

64. Tallon; "A jurist belonging to the Common Market must be a comparatist," 10 Journal of the Society of Public Teachers of Law 1969, pp.265–270.

65. Some idea of the present English predicament can be gained from the wry observations of Rinsho Mitsukuri, over a century ago:

"In 1869 an order came down from the Meiji government to translate the French Penal Code. At that time I was serving at the place known as the 'Southern College of the University' (Daigaku Nanko). Even though I was ordered to do the translation, I could not understand it at all. However, it was not a complete lack of understanding, though at first I could not understand much of it. But since somehow I thought I would like to translate it, I did get started on the translation all right. However, it was a translation done without commentaries, dictionaries or tutors and I was completely in a daze, but at first I wrote just what I understood, making mistakes as I went. Thereafter, I translated successively, the Civil Code, the Commercial Code, the Code of Procedure, the Code of Criminal Instructions, the Constitution, etc., but I really did get a hazy translation."

66. Kahn Freund; note 19 above.

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ENGLAND.

(by R. A. at Nagoya, Japan on Sept. 13, 1977)